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Built on Excellence



Part of our remarkable staff today at Feltmate Delibato Heagle. Their skills, dedication and personable natures are at the heart of how we do business.



From the Editor's Desk...

By Brian Heagle

Big ideas often have small beginnings. Our journey began over chicken wings in 1997.

That's when Miles Feltmate and I met at the original Chaps restaurant in Burlington to first discuss a partnership.

Miles had co-founded a law firm in 1981 (which merged with another firm where Fulvio Delibato was a partner). After moving to the corporate world to work with a franchising company, he was ready for a new challenge.

Miles, Fulvio and I officially opened the doors of Feltmate Delibato Heagle on May 1, 1997.

We grew rapidly. After hiring an office manager (Pam Teckoe) and our first associate lawyer (Paul Lewis), we expanded to Oakville (2004) and grew to over 35 people.

The initial partnership group also evolved: Ron Weston joined us with his thriving practice in 2000, and James Tuck became a partner last year after building his business at the firm.

15 years on, we celebrate our history and success – including an ambitious goal written on a Chaps napkin to “become the leading law firm in Halton”.

We couldn't have accomplished any of this without you. Thank you.



The team circa 2005...



Feltmate Delibato Heagle

L A W Y E R S

Breach of Trust in Construction - A Powerful Remedy

By Cam Neil



In the construction industry, unique legal remedies are available to contractors and sub-contractors under the provisions of the *Construction Lien Act* (the “Act”). The most well-known remedy is the construction lien. It would be difficult to find a builder, developer, contractor, sub-trade or material supplier who is not aware of lien rights.

The same cannot be said for the lesser known remedy afforded under the Act – breach of trust.

The provisions concerning breach of trust can be found in Part II of the Act and all builders, developers, contractors, sub-contractors, trades and suppliers to the construction industry should be aware of them. Conduct that is off-side of the provisions of Part II can lead to personal liability for a corporation’s officers and directors, and anyone who has effective control of the corporation’s activities.

The breach of trust provisions apply to a construction project so long as the work supplied to the project was originally lienable. However, the breach of trust remedy is not otherwise tied to lien rights and the rigid timelines that the lien regime is known for do not apply.

There is no requirement that a lien be in place for the breach of trust provisions to apply. In fact, an action can be maintained for breach of trust regardless of whether lien rights have expired. It is a stand alone remedy and is actually prohibited from forming part of a lien action.

Part II of the Act

Part II provides that owners, contractors and subcontractors who receive money on a project must first pay those who supplied services and materials to the project. The failure to do so amounts to breach of trust, which can create personal liability.

In other words, before any funds received are used to pay overhead and operating expenses, construction suppliers must first be paid. The best practice is to maintain a separate trust account in order to segregate trust funds. The courts have held that the failure to segregate trust funds into a separate account constitutes a *prima facie* breach of trust. Even the Act does not expressly set out that it is mandatory to have a separate trust account.

Section 7 deals with the owner’s trust and provides as follows:

7. (1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.

The obligations of an owner as trustee are found in section 7(4):

- (4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner’s own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner.

Section 8 deals with the contractor and subcontractor’s trust and provides as follows:

8. (1) All amounts,
 - (a) owing to a contractor or subcontractor, whether or not due or payable; or
 - (b) received by a contractor or subcontractor,
 on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

The obligations of the contractor and subcontractor as trustee are found in section 8(2):

- (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor’s or subcontractor’s own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

Personal Liability

The serious implications for breach of trust, and the ability to pierce the corporate veil, can be found in section 13 of the Act:

Liability for breach of trust By corporation

13. (1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
 - (a) every director or officer of a corporation; and
 - (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities, who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust.

Effective control of corporation

- (2) The question of whether a person has effective control of a corporation or its relevant activities is one of fact and in determining this the court may disregard the form of any transaction and the separate corporate existence of any participant.

Conclusion

Those in the construction industry are well-advised to review and understand the breach of trust remedy. They should also maintain a separate trust account, segregated from the general account, for receiving monies on account of a construction project and distributing to suppliers lower on the construction ladder – or be faced with having to respond to a breach of trust claim brought against the individual personally, as well as the corporation.

Your Guide to the New *Not-for-Profit Corporations Act*

By James Tuck



Do you currently hold a volunteer or paid position with a non-profit organization in Ontario, or are you considering getting involved? If so, you'll want to be aware of changes set to come into force in late 2012.

Non-profits are the volunteer services organizations that we are all familiar with in our community. Common examples include: social

and service clubs, amateur sports associations, churches or church associations, private schools, professional associations and charities (including religious organizations). According to the Ontario government, Ontario's not-for-profit sector employs about 16 per cent of all employed Ontarians and generates nearly \$50 billion in annual revenues.

Not all non-profit organizations are also not-for-profit corporations. Non profits that have not incorporated are treated for legal purposes as simply a collection of individuals. Incorporating gives an organization a legal status separate and apart from the individual organizers. While it is not essential for a non-profit organization to incorporate, doing so is highly recommended in order to isolate the activities and liabilities of the organization from the individuals involved.

Many not-for-profit organizations, especially smaller ones, can be burdened by the cost of financial audit requirements.

A Not-for-Profit corporation must carry on its activities without the purpose of gain for its members. It must have not-for-profit purposes and use any profits to promote those purposes. It is incorporated but doesn't issue shares like a regular business corporation. Instead, it has members who guide the activities of the organization through a Board of Directors who are selected and elected by the members, typically on an annual basis, to direct the day to day activities on behalf of the membership.

Not all non-profit corporations are also charities. To also qualify as a charity, a non-profit must apply and qualify for charitable status to benefit from tax-exempt status and to issue tax deductible receipts to donors. Not surprisingly, charitable status comes with additional financial disclosure and other government reporting requirements that ensure proper accountability.

The new Not-for-Profit Corporations Act, 2010, which is set to be proclaimed into force in late 2012, was intended to modernize the legal framework for Ontario's approximately 46,000 not-for-profit corporations and make it easier for them to operate.

Under the new Act, directors and officers will be held accountable through a statutory duty of care which holds them to a higher standard

to act in good faith and in the best interests of the organization. As a trade off against this higher standard of accountability, directors and officers that follow the proper requirements and standards will be better protected from personal liability.

The new Not-For-Profit Corporations Act will provide more rights for individual members of non-profits. Members will have more remedies if they believe the directors are not acting in the best interests of the corporation. Members will have greater access to financial information.

If disciplinary action is being considered against a member by an organization, the member will now have the right to be given notice with reasons and the right to be heard (aspects of fundamental justice).

The new Act also clarifies and confirms that not-for-profit corporations are allowed to engage in commercial activities so long as the profits are reinvested in support of the corporation's not-for-profit purposes.

Many not-for-profit organizations can be burdened by the cost of financial audit requirements. The new Act provides for a simpler financial review process in place of an audit in certain circumstances.

When being invited to join a volunteer organization, we recommend that you consider asking the following important questions:

1. What is the legal status of the organization? Is the organization properly incorporated under the Not-For-Profit Corporations Act (or its predecessor Acts)?
2. What are the organization's stated "purposes" or "objects"?

By law, the legal document creating the not-for-profit corporation must specifically set out the purpose or objects for which the organization was created and exists. We recommend requesting a copy of the Certificate of Incorporation (known as "Letters Patent" for older non-profits), together with any amendments and changes, to ensure that the stated goals of the organization match with and meet your expectations.

3. Does the organization maintain director's and officer's liability insurance for my benefit and for the benefit of all other volunteers? We recommend requesting a copy of a certificate of insurance, showing current director's and officer's liability insurance coverage both at the outset of your involvement and on at least an annual basis.

Volunteers are the fuel that drives many of our community's most important activities and undertakings. Contributing your time and talents to a worthy organization can be personally fulfilling and rewarding, while at the same time helping to maintain a community that we can be proud of and want to live in. Armed with some key legal concepts, you'll also be in an excellent position to make the most effective use of your time and talents.

FDH News



Feltmate Delibato Heagle was a proud sponsor of the Joseph Brant Memorial Hospital Foundation's 12th annual Crystal Ball. The event raised over \$295,000.

Left to right: Dan's Welding (Allison Nielsen, Brad Jessome), YMCA (Peg and Bryan Webber), FDH (**Brian and Ria Heagle**), Royal Coachman (Ross Nelson, Sheila Locke).



Halton County Law Association Golf Tournament, in support of Danielle's Place (an eating disorder support and resource centre in Burlington).

Left to right: Paul Stunt, The Honourable Madam Justice Giselle Miller, **Tibor Sarai**, **Cam Neil**



David Rickards raised over \$2,600 in the Ride to Conquer Cancer, benefiting the Princess Margaret Hospital. The ride from the CNE to Niagara Falls is 217km over 2 days. Congratulations David!

F E E D B A C K

We are always interested in hearing what you think about our Newsletter. If you have any comments or suggestions, or a topic that you would like to see covered, please contact our Editor, Brian Heagle at bheagle@fdhlawyers.com.

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